IN THE TENNESSEE SUPREME COURT
AT NASHVILLE

PHIL BREDESEN, Governor of the State of Tennessee, Plaintiff, v. TENNESSEE JUDICIAL SELECTION COMMISSION, Defendant.	)	No. M2006-02721-COA-R3-CV Appeal from the Chancery Court of Davidson County No. 06-2275 III

REPLY BRIEF OF APPELLANT, J. HOUSTON GORDON

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Comes now the Appellant, J. Houston Gordon, by and through counsel of record, and submits this reply to the briefs filed by the Attorney General on behalf of the Governor and counsel on behalf of the Tennessee Judicial Selection Commission (the "Commission").

I.

THE PROCEDURAL ISSUES

Introduction

The parties, obviously, do not agree on what is the determinative issue in the case. The Chancellor, the Attorney General and Gordon agree that the first issue for consideration is the construction of the relevant parts of the statute enacting the Tennessee Plan. They also agree that if the case can be decided by statutory construction, the issues regarding the Tennessee Human Rights Act and other statutory and constitutional issues should be pretermitted.

The procedural issues presented by the facts of this case are not explicitly discussed in the language creating the Tennessee Plan, T.C.A. §§17-4-101 *et seq.* ("The Plan"),[1] but we respectfully submit that the procedure necessary to carry out the purpose and objectives of The Plan is clear. *Salee v. Barrett*, 171 S.W.3d 822, 828 (Tenn. 2005). The question is: Which of the competing statutory interpretations advanced by the parties best serve the goals and purposes of the legislation, i.e., the selection of the "best **qualified** persons **available** for service?" T.C.A. §17-4-101(a). (Emphasis added.)

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[1]Indeed, the Governor's complaint below concedes that the question as to who could be included on the second panel was not explicitly answered in the statute. See Complaint for Declaratory Judgment, §24.

The Chancellor's decision, though based primarily on a construction of the statute, failed to preserve the core feature of The Plan, and necessarily created a conflict between the administrative discretion of the Governor and the equal protection rights of Gordon and Lewis. It is not clear why the Chancellor found that the "disqualification" of Gordon was a defect in the selection procedure that required a remand to the Commission but the "unavailability" of Dinkins did not. Had the Chancellor focused on the initial procedural defect, the unavailability of Dinkins, the essential provisions of The Plan would be preserved, the respective roles in the selection procedure assigned to the Governor, and the Commission would be protected and the statutory and constitutional issues discussed by Lewis and the Attorney General would be rendered moot.

Lewis' brief does not discuss the issue of statutory construction, and the Commission's brief focuses on the procedural issues only to contend that the Governor cannot limit the Commission's discretion in choosing nominees and the Commission has absolute discretion in choosing the nominees from which the Governor must appoint.

In his argument regarding the procedural problem created by the withdrawal of Chancellor Dinkins as a nominee, the Attorney General recites the statute and concludes, rather amazingly, "there was nothing 'incomplete' or 'defective' about the July 18 panel of nominees certified to the Governor by the Commission either before or after Chancellor Dinkins notified the Governor that he no longer wished to be considered for appointment," and, further, "it is the Commission's certification – not the nominees continuing availability – that fixes the identity of the three persons from whom the Governor may choose to make an appointment." (Attorney General's Brief, p. 18). The fact that the Governor is limited initially to two, and finally to not more than five, nominees who are "qualified and available" to serve on the Court apparently is considered to be of no significance to the Attorney General. We would ask, rhetorically, would the Attorney General have the same view if the residence of one nominee was discovered to be in East Tennessee and/or the third

nominee had died since the three nominees were certified? It is noteworthy that in undertaking to defend the Governor, the Attorney General would allow the Governor's participation in the selection procedure to be significantly compromised. The limitation on the Governor's prerogative occurred inadvertently in this case, but it can occur other than inadvertently in future cases. That is not the intent or the plain meaning of the statute.

The Requirement of "Qualified and Available"

The availability of each nominee to serve if appointed is a fundamental provision of The Plan. The Attorney General's position and the Chancellor's decision would essentially eliminate that requirement in this and in future cases. The construction of the statute advocated by Gordon would preserve the integrity of The Plan, and protect the Governor's right to choose from among six qualified and available nominees rather than five or fewer.

Besides the basic qualifications that each nominee be an attorney licensed to practice in Tennessee and meet age and residence requirements of the Constitution and the further limitation that the nominee was not defeated in an election for the office that is vacant,[2] the requirements mandated by The Plan are that each nominee be "qualified" **and** "available to serve." T.C.A. §§17-4-101(a) and 109(e). This dual requirement of "qualified" and "available" is stated both in the declaration of purpose and intent section of The Plan,[3] and in the section dealing with the mandated duties of the Commission.[4]

The Attorney General argues that the trial court correctly construes T.C.A. §§17-4-109(e) and 112(a) by finding that The Plain does not require that the three nominees be both "qualified and available to serve" before making an appointment or rejecting all three nominees. The Attorney

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[2] T.C.A. §§17-4-109(f) and 110

[3] T.C.A. §17-4-101(a)

[4] T.C.A. §17-4-109(e)

General asserts that, even though a nominee who has been "certified" is no longer available to serve (whether by withdrawal, disqualification, death, disability, lack of law license, or any other reason), the Commission has no further role with respect to those nominees. The argument is that certification by the Commission ends the Commission's role and triggers the Governor's authority to act, even if there are fewer than three nominees from which to choose or, logically, no nominees from which to choose. This interpretation elevates form over substance and defeats the expressly stated purpose and intent of The Plan. T.C.A. §17-4-101(a)(b). It also ignores well settled rules of statutory construction. When the requirement that the nominees be "qualified and available" is considered in conjunction with the public policy result sought to be obtained by The Plan, it is clear that the Attorney General's argument should be rejected and that the trial court's decision should be reversed.

All sections of The Plan must be read in conjunction with the statute as a whole and in light of the general purpose, plan and object of the legislation. *Kradel v. Piperton Industries, Inc.*, 60 S.W.3d. 744, 750 (Tenn. 2001), *answer to certified question confirmed to* at 308 F.3d. 328. *State v. Morrow*, 75 S.W.3d. 919, 921 (Tenn. 2002). The Court must look to the language of the statute, its subject matter, the object and reach of the statute, the wrong or evil which it seeks to remedy or prevent, and the purpose sought to be accomplished by the statute. *State v. Collins*, 166 S.W.3d 721, 726 (Tenn. 2005). The construction of The Plan by the trial court eliminates one of the specifically mandated requirements for nominees, availability. It undermines the purpose of The Plan, diminishes the role of the Commission and restricts the prerogative granted to the Governor by decreasing the number of nominees available from which he may choose. Given its plain meaning, "qualified and available to serve" preserves the mandated number of choices for the Commission to submit to the Governor and protects the right of the Governor to have the maximum number of nominees from which to choose. It prevents frustration of The Plan by the disability, death,

disqualification or withdrawal of one or more of the nominees. It also avoids the necessity of legislation to eliminate the confusion and uncertainty regarding The Plan that would result if the Chancellor's construction of the statute should be adopted.

II.

THE INTERNAL INCONSISTENCY OF THE TRIAL COURT'S DECISION

Gordon's position is that the proper construction of the statute renders moot all other issues. As stated in Gordon's initial Brief,[5] the trial court's conclusions concerning the first "panel" are inconsistent with her conclusions as to the invalidity of the "second panel." The Attorney General's argument that the initial certification of three nominees necessarily ends the Commissions' role is inconsistent with the relief sought – replacement of Gordon as a nominee on the "second panel." The Attorney General argues that it is certification that ends the Commission's role even though one of the initial nominees certified is qualified, but unavailable to serve. Nevertheless, argues the Attorney General, the Commission has no authority to replace the unavailable nominee.

While recognizing that the exclusive "power of nomination" rests with the Commission under the statutory scheme,[6] the Attorney General's argument would limit that exclusive power as to the first nominees but restore it as to the second group. If, as the Attorney General argues, "under the plain terms of the statute, it is the Commission's certification – not the nominees' continuing availability – that fixes the identity of the three persons from whom the Governor may choose to make an appointment,"[7] then it is the certification by the Commission of the nominees on the second panel that fixed the identity of the three persons from whom the Governor is to choose, even though one nominee, he contends, is disqualified. The certification process is over. "[T]he Commission has

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[5]Gordon's Principal Brief, Footnote 1, p. 4-6

[6]Governor's Brief at p. 17

[7]Governor's Brief at p. 18

no further role to play in the appointment process..."[8] The consequence of the Attorney General's argument, if applied consistently, would limit the nominees from whom the Governor must appoint to Bailey and Koch.

With regard to one of the three "nominees" certified on the second panel, the Attorney General argues that Gordon is "unavailable" because he was earlier nominated. This unavailability does not prohibit the Commission, he concludes, however, from making a "fourth" nomination since Gordon, although qualified, is not available because Gordon was a nominee on the first panel. Gordon respectfully submits that this argument is totally inconsistent. If the Commission is foreclosed from replacing an "unavailable" nominee on the first panel because its statutory duty ended with its certification, it is also foreclosed from replacing a "disqualified" a nominee on the second panel.

Should it be determined that there can be less than "three nominees" who are "qualified and available to serve" on a panel from whom the Governor may appoint (the first panel), then the word, "panel" as used in Section 112(a) means something different than "three nominees." Under that construction, it is simply a list of names and the Commission has the discretion to submit "one other" list or a "second" list that is different from the first. The change of one name would result in a new and different list. The logical consequence of the Attorney General's argument would be that all nominees on the second panel are eligible for appointment.[9] The Attorney General's argument is inconsistent and, we submit, does not comply with the plain meaning and purpose of The Plan.

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[8]Governor's Brief at p. 17

[9]Gordon's Principal Brief, pp. 10-11.

III.

THE PRETERMITTED SUBSTANTIVE LAW ISSUES

Should the Court find it necessary to address issues under the Tennessee Human Rights Act and/or the Equal Protection provisions of the State and Federal constitutions, Gordon adopts the positions argued by the Judicial Selection Commission and those of Intervenor/Appellant Lewis.

IV.

CONCLUSION

Appellant submits that this Court should hold that "three nominees" means three persons who are "qualified and available to serve" and that when any person nominated during the selection process becomes unavailable or disqualified, the Commission is charged with the duty to fill the vacancy created with a nominee who is "qualified and available to serve." This carries out the purpose of The Plan and forecloses frustration of The Plan by actions of a nominee, the Commission, the Governor, or by unexpected events such as the death, disability or disqualification of one or more nominees.

RELIEF REQUESTED

For all of the above reasons, this Court is requested to reverse the decision of the Chancellor below and enter an order correcting the procedural defect by having the Judicial Selection Commission submit a third nominee's name to the two nominees certified on July 18, 2006 or, in the alternative, declare the three nominees named on September 7, 2006 as constituting a valid panel.

RESPECTFULLY SUBMITTED this the 26th day of January, 2007.

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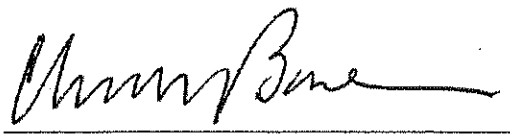
BY: 

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CERTIFICATE OF SERVICE

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